

Making a difference?

Refusing relief under section 31 SCA 1981
in Judicial Review

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Today's presentation

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of the
provisions

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Section 31 of the Senior Courts Act 1981

Formerly known as the Supreme Court Act 1981



Section 31

(2A) The High Court—

- (a) **must** refuse to grant relief on an application for judicial review, and
- (b) **may not** make an award under subsection (4) on such an application, if it appears to the court to be **highly likely** that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of **exceptional public interest**.

Section 31

(3C) When considering whether to grant **leave** to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and


(b) **must** consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court **must** refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that

- ~~it is appropriate to do so for reasons of exceptional public interest.~~

Added by Criminal Justice and Courts Act 2015



In judicial review cases the court has discretion over whether to provide a remedy (“relief”), such as a declaration clarifying the rights and obligations of the parties or ordering a decision to be retaken. Whether or not to grant relief is up to the court, and the courts have – regardless of this Act - refused to provide relief where there would have inevitably been no difference to the outcome even if the reason for bringing the judicial review had not occurred.

Section 84 modifies the existing approach (which was developed by the courts in case law) so that relief is not to be granted and permission to seek that relief is not to be granted where the court considers the conduct complained about would be highly likely not to have resulted in a substantially different outcome for the applicant, unless the court considers that it is appropriate to grant relief or permission for reasons of exceptional public interest. If the court relies on this exception, it must certify that it has done so.



Starting point: *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214

(1) It has long been established that, in a claim for judicial review, the court has a discretion whether to grant any remedy even if a ground of challenge succeeds on its substance.

(2) In *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041, it was established that it is not necessary for the claimant to show that a public authority would (or even probably would) have come to a different conclusion. What had to be excluded was only the contrary contention, namely that the Minister "necessarily" would still have made the same decision. Accordingly, the *Simplex* test required that, before a court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred.

(3) The *Simplex* text has been modified by amendments made to section 31 of the Senior Courts Act. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.



Recent case law in practice



R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489

Facts

Challenge to two decisions to grant planning permission for two developments at a farm within the National Park

Challenge was failure to provide appropriate assessments under the Conservation of Habitats and Species Regulations 2017 to the planning committee, and to publish such assessments before the decision

Issues

Was there a failure to inform the planning committee about the relevant assessments so that they could make an informed decision?

If so, should relief nonetheless be refused under s 31(2A)?

R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489

First instance

Jay J found that there had been a “technical breach” of the regulations

But “a modicum of reality needs to enter this discourse”

The outcome would clearly have been the same

Had the breach not occurred nothing new would have been said, even if more people had been saying it

Relief refused

Court of Appeal

Both sides challenged the decision, for different reasons but the Court of Appeal agreed that there had been a breach

How did it treat the Judge’s refusal of the breach?

R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489

Analyse the outcome and the breach

The outcome in this case was that the respondent resolved to grant planning permission for the two developments subject to certain conditions. The real legal error that occurred was the fact that it did not have appropriate assessments under the 2017 Regulations when it resolved to grant permission. However, the assessments, when finalised, concluded that adverse effects on the River Wye SAC could be avoided if certain specified planning conditions were imposed. Those conditions were materially identical to the ones that had, in fact, been imposed by the planning committee when it resolved to grant planning permission.

What would have happened but for the breach

The error did not have any effect on the decision that the planning committee took. Put simply, in this case, the outcome (the grant of planning permission subject to specific conditions) would not have been any different if the planning committee had had the assessments available to it when it resolved to grant planning permission.

The judge was upheld

R (Greenfields (IOW) Ltd) v Isle of Wight Council [2025] EWCA Civ 488

Facts

Challenge to grant of planning permission for 473 new houses

There was a s106 agreement with the developer which the council failed to publish (either in draft or as executed) before planning permission was granted.

Issues

Issue was whether failure to publish made the decision irregular, and if so whether s31(2C) applied

(Other issues included delay, bias, procedural irregularity)

What should the Judge do?

R (Greenfields (IOW) Ltd) v Isle of Wight Council [2025] EWCA Civ 488

First instance

Jarman J

Permission to seek judicial review refused under s 31(2C) but granted on other grounds

Court of Appeal

Failure to publish does not itself lead to total invalidity; need to consider the consequences.

The consequences of non-compliance was [sic] to deprive the appellant of the opportunity to comment upon the contribution.

So there was unlawfulness.

How should they treat s31(2C)?

R (Greenfields (IOW) Ltd) v Isle of Wight Council [2025] EWCA Civ 488

The approach

Paragraph 73:

The court is concerned with evaluating the significance of the error on the decision-making process. It is considering the decision that the public body has reached, and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error. It is not for the court to try and predict what the public authority might have done if it had not made the error.

Evidence?

If the court cannot tell how the decision-maker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of section 31(2A) are unlikely to be satisfied.

R (Greenfields (IOW) Ltd) v Isle of Wight Council [2025] EWCA Civ 488

The conclusion

The evidence relied upon by [D] falls far short of the material capable of demonstrating that this court could be satisfied that the outcome would not have been substantially different. ...
It is simply not possible to determine whether or not Counsel is correct

Outcome

The judge was **wrong** to refuse permission to apply for judicial review on this ground. He ought to have granted permission and, for the reasons given above, the court should not refuse a remedy in relation to ground 1 of the appeal. The court cannot be satisfied that it is highly likely that the outcome would not be substantially different. The financial contribution required might be different if the section 106 agreement had been placed on the planning register and members of the public had been able to comment on its terms. No other principle justifies the refusal of a remedy as a matter of the court's discretion in respect of ground 1.

R (Hippolyte) v Secretary of State for the Home Department [2025] EWCA Civ 1493

Facts

Application for indefinite leave to remain (ILR) under the Windrush scheme refused because H was not habitually resident in the UK between 2013 and 2020

SSHD has a residual discretion to waive that requirement and did not consider whether to exercise it

Issues

Claimant argued that SSHD's failure to consider whether to exercise her discretion was an error of law (a contravention of the non-fettering principle).

The Judge at first instance agreed that there was an error of law.

What does s 31(2A) mean in this case?

R (Hippolyte) v Secretary of State for the Home Department [2025] EWCA Civ 1493

First instance

Sheldon J agreed that there was an error but said that it was highly likely that the SSHD would have reached the same conclusion.

Counsel for each side made submissions as to what would have happened, e.g. that she had lost the chance to apply under the scheme, conversely that she had that there was no evidence that C would have applied in 2000 as a child, or that she had suffered prejudice.

The pros and cons of the exercise of discretion were ventilated and the Judge sided with the SSHD.

Court of Appeal

The Claimant appealed and SSHD submitted a Respondent's notice.

The Court of Appeal dismissed the SSHD's points. She should have considered whether to exercise her discretion.

How should the Judge have approached s 31(2A)?

R (Hippolyte) v Secretary of State for the Home Department [2025] EWCA Civ 1493

The parameters of the provision

Plan B: - courts should still be cautious about straying, even subconsciously, into the *forbidden territory* of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law.

The normal course should be to quash and remit the question to the decision maker.

Evidence

The Judge had strayed into forbidden territory and had assessed the merits of the exercise of discretion.

The SSHD had not filed evidence as to what she would have done had she thought about her discretion.

The Court should not step into her shoes.

Appeal allowed.

But that did not mean that the Claimant would get leave to remain.

R (Coulthard) v Secretary of State for the Environment, Food and Rural Affairs [2025] EWCA Civ 1671

Facts

Challenge to the secondary legislation banning XL Bully dogs under powers conferred by the Dangerous Dogs Act 1991

PSED assessment of the impact of the order was short and merely said

- not aware of any evidence that XL bully breed types are disproportionately owned by individuals with protected characteristics

There were two other assessments. A later, fuller assessment considered the impact on people with medical needs and victims of domestic abuse

Issues

Claimant argued that there was a failure to comply with the PSED (as well as many other challenges)

What does s 31(2A-C) mean in this case?

R (Coulthard) v Secretary of State for the Environment, Food and Rural Affairs [2025] EWCA Civ 1671

First instance

Laing J found the first, second and third assessments did not comply with PSED but the fourth one did

Nonetheless the Secretary of State was in breach of the PSED

But in light of the last, successful attempt to comply, the outcome would not have been substantially different

Relief refused on that ground

Court of Appeal

Claimant argued that there were exceptional public interest reasons to grant relief despite “NSD” as there had been prosecutions already

How should the Court approach the public interest test?

R (Coulthard) v Secretary of State for the Environment, Food and Rural Affairs [2025] EWCA Civ 1671

Does s31(2A-C) apply in relation to secondary legislation?

Yes, it does.

49: there is no reason why the "no difference" principle cannot apply where regulations are ultra vires an enabling Act and the power to act does not exist.

The right approach

72. The exercise which a court must perform in considering section 31(2B) is a two-stage one. First, the court must make an evaluative assessment of whether there are reasons of exceptional public interest which would justify not applying the duty which otherwise arises under section 31(2A) . If the answer is Yes, then the court has a discretion ("may") to grant relief to the applicant even though otherwise the duty in section 31(2A) would apply.

There are no categories of case where it will inherently be in the public interest not to apply s31(2A)

Appeal dismissed

R (RAMFEL) v Home Secretary (No 2) [2026] EWCA Civ 86

Facts

JR of the SSHD's failure to provide any documentation to migrants who enjoy extended leave ("section 3C leave") to remain which demonstrates their status to third parties for work and other purposes. The SSHD was gradually introducing eVisas, but there were many with section 3C leave who had no documentation at all. Cs said that in discharging the functions which led to this state of affairs the SSHD had not had regard to the best interests of children as required by section 55 of the Borders, Citizenship and Immigration Act 2009. At first instance claim succeeded on this ground and judge ordered the grant of eVisas to all section 3C leave migrants. SSHD appealed.

Issues

No pleaded challenge to any specified decision on SSHD's part, merely a complaint about an ongoing state of affairs. However, the section 55 duty was a process duty and a specific decision of the SSHD should have been identified. The failure to do so led SSHD to focus in the DGD on a case which was quite different from the one which emerged at the hearing (which targeted the roll-out of eVisas) and which led the judge to proceed to make a decision on a basis which had never been pleaded.

R (RAMFEL) v Home Secretary (No 2) [2026] EWCA Civ 86

Court of Appeal

Court not sure that the evidence before the judge would have justified a refusal of relief on the basis of section 31(2A).

Had the claimants pleaded explicitly that it was their case that eVisas should have been made available from the start to everyone on section 3C leave, and/or that groups with dependent children should be prioritised in the roll-out, it is likely that the SSHD would not only have sought to rely on section 31(2A) but would have provided fuller evidence than was given at the hearing.

Consequences

The SSHD had suffered real prejudice.

The claimants should not be granted any relief, even if the Secretary of State had failed to carry out a section 55 exercise when she decided how to implement the introduction of eVisas.

R (BUJ) v LB Bromley [2026] EWHC 102 (Admin)

Facts

Challenge to a decision to close one of two adult education centres within the borough of Bromley and relocate services at other locations. The claimant, who regularly used the centre, brought three grounds of challenge, including a failure to consult. The matter was determined at a rolled-up hearing.

Issues

Had there been an arguable failure to consult?

What difference would consultation have made to the decision, having regard to section 31(2A)?

R (BUJ) v LB Bromley [2026] EWHC 102 (Admin)

Finding on the duty to consult

Long-term users of the centre had a legitimate expectation to consultation. Fairness required that the defendant consult with learners and their families/carers before deciding to close the centre and the claimant was prejudiced by that failure to consult. He and others were denied the opportunity to be heard. They had something to say that was relevant to the decision to be taken. They would have commented on whether the need for specialist courses in the south of the borough was so important that it outweighed the factors in favour of closure.

Conclusion on section 31(2A)

The only arguable error was the failure to consult. There was in the evidence a full and clear explanation of the defendant's decision-making process and its rationale. The defendant had a public need and duty to address its budgetary and housing challenges by disposing of property where services could be adequately provided elsewhere. The failure to consult was highly likely to have made no difference to the outcome. Although the claimant and others were entitled to be consulted, it is clear that nothing would have arisen in the consultation that could or would have changed the outcome. Permission granted but relief refused.



Takeaways



Takeaways

- (1) The focus of the exercise under s 31(2A) is the decision that the public body has reached, and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error (*Bradbury* [71]).
- (2) It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decisionmaker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of section 31(2A) are unlikely to be satisfied (*Bradbury* [71]).
- (3) The question for the court is whether it is highly likely that there would be no substantial difference in the outcome if the legal error had not occurred. That is a high test to surmount (*Bradbury* [74]; *Plan B* [273]).
- (4) It does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been “substantially different” for the claimant (*Plan B* [272]).

Takeaways

(5) Don't rely on the 14 principles in *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin); [2022] RVR 37 (*Bradbury* [73-75]).

(6) There is nothing in the wording of section 31(2A) or (2B) which restricts their scope and in some way excludes secondary legislation which creates criminal offences (*Coulthard* [50]).

(7) In a case where there has been a failure to exercise a discretion at all (as distinct from e.g. a failure to take into account a relevant consideration where the discretion has undoubtedly been exercised), a court should be especially careful not to try to step into the shoes of the relevant public authority. The normal course will be for the court to quash the decision and remit the matter to the public authority to determine for itself (*Hippolyte* [76]).

(8) If reliance is to be placed on section 31(2A), the court should be given a full, accurate and clear explanation of the defendant's decision-making process by witness statement. The court should not have to depend on submission by advocates nor should it have to piece together a number of different documents in order to understand what happened (*Greenfields* [105-106]).

Takeaways

(9) Section 31(2A) can be relied on where there has been a failure to consult, or make relevant documents available for public consideration, if the evidence shows that there was nothing consultees or the public said, or could have said, that would have made a difference to the outcome (*Bradbury* [78-82]; *BUJ v Bromley* [55; 76-79]; cf *Greenfields* [63-67, 70, 77])

(10) The above principles apply also at the leave stage under section 31(3D) (e.g. *R (Hughes) v Kirklees Council* [2025] EWHC 3136 (Admin)).

(11) Where a claimant fails to plead their claim adequately and this causes prejudice to the defendant because, misunderstanding the case against it, the defendant fails to put in sufficient evidence to make out the highly likely test under section 31(2A), this may justify the refusal of relief (*RAMFEL* [25-26]).



Thank you

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